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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-187

Supreme Court, U.S.
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PATTIE BLACK COTTON, *et al.*,

Petitioners,

v.

SCOTLAND NECK CITY BOARD OF EDUCATION, *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the Court of Appeals (A. 1104) is reported *sub nom. United States* v. *Scotland Neck City Board of Education*, 442 F.2d 575 (4th Cir. 1971). Dissenting opinions by Judges Winter and Sobeloff are reported at 442 F.2d 588 and 442 F.2d 593.

The opinion of the United States District Court for the Eastern District of North Carolina (A. 1062) is reported *sub nom. United States* v. *Halifax County Board of Education*, 314 F. Supp. 65 (E.D. N.C. 1970).

Jurisdiction

The judgment of the Court of Appeals was entered March 23, 1971. The petition for certiorari was filed May 20, 1971, and was granted on October 12, 1971. The case was consolidated with *United States* v. *Scotland Neck City Board of Education*, No. 70-130, in which certiorari was also granted October 12, 1971. The jurisdiction of the Court rests on 28 U.S.C. section 1254(1).

Questions Presented

Whether the Court of Appeals erred by holding that new school districts may be formed which divide a unit that is faced with the duty to desegregate a dual system where the changed boundaries result in less desegregation and where formerly the absence of such boundaries was instrumental in promoting segregation.

Constitutional and Statutory Provisions Involved

1. This case involves the constitutionality of Chapter 31 of the 1969 Session Laws of North Carolina which is set out in the appendix to this brief, pp. 16b, *et seq.*

2. The case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. *Proceedings Below*

This case (consolidated here with No. 70-130, *United States* v. *Scotland Neck City Board of Education*) involves the desegregation of the public schools operated by the Halifax County Board of Education in North Carolina.

The school system of some eighteen schools and slightly more than 10,600 pupils (in 1968-69) embraces a rural area and a number of small towns such as Scotland Neck, a community with about 695 resident pupils. The county has long maintained a dual system of racially segregated schools, and while the county school board was engaged in negotiating with the United States Department of Justice about a desegregation plan, local citizens obtained passage of Chapter 31 of the 1969 Session Laws of North Carolina which created a new independent school system for the town of Scotland Neck and thus separated the town and its one school from the county school system and its desegregation plans. This case involves the constitutionality of Chapter 31 in the context of the desegregation process.

The complaint (A. 26 and amendment at A. 62) was filed by the United States on June 16, 1969, in the Eastern District of North Carolina seeking the desegregation of the schools by a more effective method than the freedom of choice plan then in effect, and seeking an injunction against Chapter 31 on the ground that it interfered with desegregation of the public schools of Halifax County and denied equal protection of the laws to Negro students. Petitioners Patty Black Cotton, et al. are Negro pupils, parents and teachers who were permitted to intervene as plaintiffs. The Halifax County Board of Education, the Scotland Neck City Board of Education, the Mayor and Commissioners of Scotland Neck and the Town of Scotland Neck were named as defendants, and several other state and local officials were later added as defendants.

After a three day hearing the district court entered a preliminary injunction on August 25, 1969, restraining implementation of Chapter 31 (A. 790). On May 26, 1970, a final injunction was entered (A. 1084), the district court

holding that Chapter 31 was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it "was enacted with the effect of creating a refuge for white students of the Halifax County School system" (A. 1083). The district court order was accompanied by a long and detailed opinion setting forth complete findings of fact. The opinion by Judge Larkins was concurred in by Chief Judge Butler who sat to hear a related case involving similar questions relating to the creation of two new school districts—Littleton-Lake Gaston and Warrenton—in neighboring Warren County located just west of Halifax. (For the general location of the several districts see Map I in Petitioners' Brief Appendix of Maps, Tables and Statutes.[1] Map I also shows nearby Emporia, Virginia involved in a companion case, *Wright* v. *Council of City of Emporia*, No. 70-188.)

The Fourth Circuit, sitting *en banc*, reversed the injunction, with Judges Sobeloff and Winter dissenting. The opinion of the court by Judge Craven upheld Chapter 31, concluding that the primary purpose of the law "was not to invidiously discriminate against black students." (442 F.2d at 582.) In the companion case involving Emporia, Virginia, Judge Craven set out the legal rule applied to decide these cases in the following language:

> If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty

[1] This Brief Appendix is hereinafter referred to as "Maps and Tables."

to end state supported school segregation. The test is much easier to state that it is to apply. (*Wright* v. *Council of City of Emporia*, 442 F.2d 570, 572 (4th Cir. 1971).)

The Court of Appeals held that the effect of the separation of Scotland Neck schools and students on the desegregation of the remainder of the county system was "minimal" and that the shift in racial percentages was "hardly a substantial change" (442 F.2d at 582).

The Court of Appeals held that the transfer plan adopted by the Scotland Neck school board immediately after its creation—by which 350 white and 10 black pupils would transfer into the unit from Halifax County and 44 black pupils would transfer out of Scotland Neck to attend Brawley School—"would have tended toward the establishment of a resegregated system" and did violate the equal protection clause of the Fourteenth Amendment (442 F.2d at 583), but found the transfer plan of "no relevance" to the constitutionality of Chapter 31 because it said that the legislature did not know that such a plan would be adopted (442 F.2d at 581-582, note 3). In so doing, the Court of Appeals ignored findings to the contrary by the district court (314 F. Supp. at 69).

The Court of Appeals' contradiction of the district court finding in this regard is significant since the Court of Appeals upheld an injunction in the companion case involving Littleton-Lake Gaston because the record in that case indicated legislative awareness of a comparable transfer scheme. *Turner* v. *Littleton Lake Gaston School District*, 442 F.2d 584 (4th Cir. 1971).

Petitions for certiorari filed by the United States and the intervening plaintiffs were granted October 12, 1971.

The Court of Appeals has stayed the effectiveness of its mandate pending this Courts' decision, and thus the implementation of Chapter 31 is still enjoined.

2. *The Public Schools in Halifax County and Scotland Neck Prior to 1968-69*

Until the creation of the Scotland Neck Administrative Unit by the North Carolina General Assembly on March 3, 1969 and by the vote of the residents of Scotland Neck on April 8, 1969, the Halifax County Board of Education administered all of the schools in the county except for two areas on the northern border of the County. (See Map II, Maps and Tables). During the 1968-69 school year there were 10,655 students: 2,357 (22.1%) white, 8,196 (76.9%) black and 105 (1%) Indian (Table I, Maps and Tables).

In 1964, for the first time, six black students were permitted to attend a formerly all-white school under a limited free choice policy. When this Court decided *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), only 3% of the black children were attending school with whites pursuant to the Board's desegregation program. (314 F. Supp. at 67).

At the time of *Green,* and a year later when this litigation commenced, the County operated four schools which housed all of its 2,357 white students and a few blacks, each offering grades 1 through 12. They were: the Scotland Neck School, located in the middle of the eastern portion of the county, Enfield School about 16 miles west of Scotland Neck, the Aurelian Springs School some 16 miles northwest of Enfield and William R. Davie approximately 8 miles north of Aurelian Springs. (See Map II, Maps and Tables).

Superimposed upon the system of schools operated for white children was a network of 14 black schools where in

October, 1968 7,446 or 90.8% of the County's black pupils attended school (Table I, Maps and Tables). In the eastern portion of the county, for example, about ¾ of a mile from the Scotland Neck School and just outside the town limits to the east is the Brawley School[2] (A. 233). Brawley, like Scotland Neck was a school serving grades 1 through 12. At the high school level—grades 9 through 12—Brawley drew students from the same geographical areas as the Scotland Neck School (A. 273-276; 149; 821). White students from the outlying county areas rode buses to the Town of Scotland Neck and went to the Scotland Neck School. Black pupils rode separate buses from the same surrounding area to the Town of Scotland Neck and went to the Brawley School. White students in the town and nearby areas walked to the Scotland Neck School. Black children in the Town of Scotland Neck and close by walked to Brawley.

In addition to Brawley, there are four black elementary schools (grades 1 to 8) in the areas surrounding the Town of Scotland Neck. Dawson is to the east, Tillery Chapel to the north, Bakers to the west and Thomas Shield to the south (Map II, Maps and Tables). At the elementary level, Brawley served the Town of Scotland Neck and its immediate environs. The black high school students in this area had traditionally gone to Brawley. All of the white children in the areas served by these five black schools had always gone to the Scotland Neck School until August, 1970 (A. 273-276; 149).

[2] The Scotland Neck School is on the west side of town. The town line separates ten acres of its campus and one four-classroom building which are located in the County. After the new unit was created arrangements were made to recapture these facilities for the use of the Scotland Neck Unit by extending the boundaries of the new unit through administrative action, and by leasing the building from Halifax County for $1.00 per year. (314 F. Supp. at 70).

This case involves the constitutional duty of North Carolina officials to desegregate the six schools in the Scotland Neck-Brawley area.

Scotland Neck is a town of less than 3,000 people. It is one mile wide at its widest and two miles long at its longest[3] (Map IV, Maps and Tables). It has a resident school population of 695 of which 399 (57.4%) are white and 296 (42.6%) black (Table IV, Maps and Tables). In October, 1968, the total attendance at the schools in the Scotland Neck-Brawley area was 3,302: 786 (23.8%) white and 2,516 (76.2%) black (Table I, Maps and Tables). This very nearly parallels the black/white ratio of the Halifax County Unit as a whole which was 22.1% white and 76.9% black (*Ibid.*).

3. *Department of Justice Intervention*

Following *Green*, the Department of Justice on July 27, 1968 sent a letter informing the Halifax County Board of Education that it would institute suit unless prompt action were taken to dismantle the dual school system in Halifax County. The negotiations which ensued produced an agreement that the Board would take some desegregation steps for the 1968-69 school year and would submit a plan for the complete disestablishment of its dual system by early 1969 to be fully implemented for the 1969-70 school year. The steps taken for 1968-69 were a few faculty transfers and the transfers of grades 7 and 8 from three black schools, and grade 7 from a fourth to four neighboring white schools. As part of the plan, grades 7 and 8 were moved from Brawley to Scotland Neck. No white students were assigned to Brawley or to any other black school in the county.

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[3] It is less than ¾ of a mile wide at its northern end where the Scotland Neck and Brawley Schools are located (Map IV, Maps and Tables).

In October, 1968, the Halifax School Board made a report to the Department of Health, Education and Welfare. Its report showed student and teacher assignments at the schools in the Scotland Neck-Brawley area as follows (Table I, Maps and Tables):

Grades	School	Pupils				Teachers	
		White	Black	Total	% Black	W	B
1–12	Scotland Neck	786	193	979	19.7%	36	10
1–6; 9–12	Brawley	0	1106	1106	100%	0	40
1–8	Bakers	0	283	283	100%	1	12
1–8	Thomas Shields	0	203	203	100%	0	9
1–8	Dawson	0	459	459	100%	2	16
1–8	Tillery Chapel	0	272	272	100%	0	11
	Totals	786	2,516	3,302	76.2%	39	98

Of the 193 black students assigned to Scotland Neck, 153 were the students in grades 7 and 8 who had been transferred from Brawley (A. 732). The rest of the students at Scotland Neck and the five other all-black schools had been assigned by freedom of choice. Only 40 or about 1½% of the black students in this area who were assigned by free choice ended up in school with white children. No white child chose any of the five black schools.

4. *The State Consolidation and Desegregation Plan*

On July 1, 1968 the Halifax Board wrote to the North Carolina Department of Public Instruction requesting that it propose to the Board a desegregation plan which would provide "the most effective organizational patterns for the county schools in order to insure the best education possible for the children" (314 F. Supp. at 68). A committee of staff members of the State Department of Public Instruction and other educators made a detailed survey of the system and made recommendations to the local board

(A. 587). The committee was directed by Dr. J. L. Pierce, Director of the Division of School Planning of the state department who was a former teacher, coach and principal at the Scotland Neck School (A. 972).

The committee made several long range recommendations and also made recommendations for an Interim Plan to meet immediate educational needs. The principal long range recommendations were to construct two new high schools to replace the nine high schools operating in the county (A. 597-605). To be implemented, the long range plan would require political and financial arrangements that would take some time to accomplish.

The Interim Plan (A. 606) was designed for immediate implementation. It proposed an organization of the schools which would effectively break up the classical features of the dual structure in Halifax County. It was essentially a consolidation plan to eliminate the duplication inherent in a typical rural segregated school system. Thus, in the small towns such as Scotland Neck and Enfield, where there had been white schools and black schools offering the same grades and serving the same areas, the schools were consolidated. The result of the plan was the elimination of five of the nine high schools and the creation of attendance zones for the elementary schools.

In the Scotland Neck-Brawley area which was designated District I, a high school district was established which covered the same area formerly served by the Scotland Neck and Brawley schools (Map III, Maps and Tables). The State recommended that all 10th through 12th grade students (white and black) in District I attend Scotland Neck and that all 8th and 9th grade students attend Brawley. At the elementary level, students in grades 1 through 7 from the Town of Scotland Neck and its immediate en-

virons would go to Brawley and the junior high site at Scotland Neck (A. 606). Elementary zone lines were to be established for grades 1-7 around the four outlying elementary schools (Bakers, Dawson, Thomas Shields and Tillery Chapel).

The state department completed its survey and recommendations in September, 1968 (A. 233-234). On December 17, 1968, the Board prepared a Table projecting student assignments by race for the state department's Interim Plan (A. 681-682). These December, 1968 projections as compared to October, 1968 percentages and grade organizations are as follows (see Tables I and II, Maps and Tables):

District I						1968-69	
Grades	School	Pupils				Grades	% Black
		White	Black	Total	% Black		
5-6; 10-12	Scotland Neck	325	640	965	66.3%	1-12	19.8
1-4; 7-9	Brawley	330	740	1070	69.2%	1-12	100
1-8	Bakers	6	387	393	98.5%	1-8	100
1-8	Thomas Shields	68	340	408	83.3%	1-8	100
1-8	Dawson	44	570	614	92.8%	1-8	100
1-8	Tillery Chapel	31	378	409	92.4%	1-8	100
	Totals	804	3055	3859	79.2%		

The State Plan was not submitted to the Department of Justice. Instead, the Scotland Neck Bill was introduced into the legislature in January, 1969 and a free choice plan was submitted to the Department of Justice in February.

5. *Chapter 31—The Scotland Neck Bill*

In the summer of 1968, Scotland Neck residents became fully aware that major changes in school assignments would

be finally required. They learned through the press that *Green* had prompted the Halifax Board to seek recommendations for a desegregation plan from the State Department of Public Instruction. The Scotland Neck *Commonwealth* gave prominent coverage to the negotiations with the Government. On August 9, 1968, under a headline "County Ordered to End Dual System," the paper reported that freedom of choice was not desegregating the schools and there are available "'other ways, such as unitary geographic attendance zoning or some form of grade reorganization or consolidation, promising speedier and more effective conversion to a unitary system'" (A. 761).

A week later, the paper reported the terms of the agreement between the Board and the Government. "[S]eventh and eighth grades of Scotland Neck and Brawley schools will be consolidated for the 1968-69 term into one junior high school" and complete disestablishment of the dual system in the county and in Scotland Neck will occur "at the beginning of the 1969-70 school year".

a. The Purpose of Chapter 31.

The district court found and the defendant had conceded that one of the purposes of the proponents was to carve out a school system with a racial ratio sufficiently tolerable to whites to stem the exodus to private segregated schools[4] from an area where the ratio was perceived to be intolerable to whites.

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[4] "The testimony and the candid admissions of counsel also indicate that the desire to preserve an acceptable white ratio in the school system was a factor behind the passage of the act. Mr. Harrison stated that he told the legislature that white children were going to private schools and that something needed to be done to retain the support of white people for the public schools. (Henry Harrison's Deposition, p. 18). Mr. Shields and Mr. Overman both testified that they felt that integration would encourage the growth of the all-white private schools. (Overman's Deposition, pp. 217-218, Shields' Deposi-

"After closely scrutinizing the record and after carefully considering the arguments of counsel, this Court is of the opinion that the following motivating forces were responsible for the design of the legislation creating the separate Scotland Neck school district: (1) the desire to improve the educational level in the Scotland Neck schools, the present conditions in those schools having been brought about by a lengthy history of neglect and discrimination with respect to financial allocations to the Scotland Neck schools by the Halifax County Board of Education; (2) a desire on the part of the leaders of Scotland Neck to preserve a ratio of black to white students in the schools of Scotland Neck that would be acceptable to white parents and thereby prevent the flight of white students to the increasingly popular all-white private schools in the area; (3) a desire on the part of the people of Scotland Neck to control their own schools and be in a position to determine their direction with more finality than if the schools were a part of the Halifax County system." (314 F. Supp. at 72).

Judge Larkins did not determine which of the purposes was predominant, but said each was significant.

"In ascertaining such a subjective factor as motivation and intent, it is of course impossible for this Court to accurately state what proportion each of the above reasons played in the minds of the proponents of the bill, the legislators or the voters of Scotland Neck,

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tion, pp. 70-71). Mr. C. M. Moore said that it was his opinion that the independent school system would be a better alternative than the private schools. (Moore's Deposition, pp. 18-19). Mr. Shields testified to the same thing and said that most of the adults in Scotland Neck held the same opinion. (Shields Deposition, pp. 23-26)." (314 F. Supp. at 73). (See A. 984.)

but it is sufficient to say that the record amply supports the proposition that each of the three played a significant role in the final passage and implementation of Chapter 31." (314 F. Supp. at 72).

The majority of the Court of Appeals canvassed the record and determined that the purposes were as Judge Larkins had found, but concluded that benign objectives of quality education and local control predominated (442 F.2d at 582). Judges Sobeloff and Winter came to the opposite conclusion. They believed that the record showed beyond question that the separation of Scotland Neck from Halifax County was conceived as a segregation plan (442 F.2d at 592, 598-600).

We agree with the dissenting judges below. But we think it would unecessarily complicate the case to recite all the facts which demonstrate that Scotland Neck's claims of legitimate non-racial motives are hollow, since Scotland Neck concedes one of its purposes was to accommodate the racial prejudices of its white patrons and since the record is conclusive that the scheme would have substantial discriminatory effects.

b. The Effects of Chapter 31.

In the Spring of 1969, after the election by the Scotland Neck voters, the new district immediately took steps to establish a new administrative unit. One of the first actions taken was to establish a transfer plan to allow students residing outside of the city limits to attend the Scotland Neck school. The new Board adopted a tuition plan whereby families would be charged $100 tuition for the first child registered and $25.00 for each additional child with a maximum of $150 per family. Meanwhile, the County School Board accommodated this policy by permitting transfers into the county from Scotland Neck

without tuition and releasing county children who sought transfer to the new unit.[5]

The Scotland Neck Unit began with a resident student population of 695 of whom 399 (57.4%) were white and 296 (42.6%) black. The transfer plan brought in 350 whites and 10 blacks; no whites and 44 blacks transferred out. The net result was an anticipated enrollment of 1,011 which will be 74.1% white. (Table IV, Maps and Tables; A. 522-524)).

The Court of Appeals thought that the transfer plan which it found to be unconstitutional had "no relevance" to the constitutionality of Chapter 31, because it said "there is nothing in the record to suggest that the Legislature had any idea that the Scotland Neck Board would adopt a transfer plan after the enactment of Chapter 31 which would have the effect of increasing the percentage of white students" (442 F.2d at 581-582, note 3). However, the Court of Appeals overlooked a district court finding of fact which shows that the legislature did know of the transfer plan:

> In November 1968, a group consisting of Frank Shields, the future chairman of the Scotland Neck City Board of Education, C. Kitchin Josey, Henry Harrison, and *Thorne Gregory, the State representative from the area,* visited the Tryon City unit, at that time the smallest school unit in the State with 823 students enrolled during the 1968-69 school year. At that time, 974 pupils were attending the schools within the corporate limits of Scotland Neck, *and it was expected that, with transfer, any new administra-*

[5] Children attending schools outside of the administrative unit where they live may do so only upon the agreement of both the unit of residence and the receiving unit. Units are permitted to establish tuition charges for non-resident students but are not required to do so. N.C. Gen. Stat. §115-163.

tive unit would have approximately the same number of pupils. (314 F. Supp. at 69; emphasis added.)[6]

Subsequently, Representative Thorne Gregory introduced and sponsored the bill, and served as Chairman of the House Finance Committee which approved it (A. 209). Since Scotland Neck had only 695 resident pupils it was obvious that planning for about a thousand students in the new administrative unit was based on a substantial number of transfers. Moreover, since nearly one-half—387 of the 786—of the white pupils attending the historically all-white school were from outside the town, it was equally obvious that the expected transfers would increase the percentage of white students in Scotland Neck School.[7]

It was only after the preliminary injunction was entered that the Scotland Neck Board suggested some control of its transfer policy (A. 796). But it has stubbornly refused to give up the idea entirely. As Judge Winter observed: "This proposal has not yet been finally abandoned. In oral argument before us, counsel would not tell us forthrightly that this would not be done, but rather, equivocally indicated that the proposal would be revived if we, or the district court, could be persuaded to approve it." (442 F.2d at 592). The obvious reasons that Scotland Neck has been

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[6] This finding was fully supported by the record. See Depositions of Overman (A. 299), Harrison (A. 366-67), and Shields (A. 422).

[7] Aside from the many *consolidations* of administrative units in North Carolina in recent years (A. 580-A. 583); *Turner* v. *Warren County Board of Education*, 313 F. Supp. 380 (E.D. N.C. 1970), there had been no new units established in North Carolina since 1953 until the post-*Green* 1969 Legislature created the small units of Scotland Neck, Littleton Lake—Gaston and Warrenton (A. 584). It is highly unlikely, therefore, that the Scotland Neck proponents would have sought to establish the smallest unit in North Carolina, particularly where North Carolina law allowed for the kind of transfer plan which was established. See note 5, *supra*.

reluctant to relinquish its ability to accept transfers are that with only 695 students it would be considerably smaller than the smallest school district now existing in North Carolina making it incapable of even approximating an adequate educational program and because its boundaries exclude nearly one-half of its traditional white patrons.[8]

In addition to the transfer plan, worked out with the Halifax Board, Scotland Neck arranged with State education officials to extend the boundaries of the unit so as to include the grounds of part of the Scotland Neck School campus which was on the county side of the town line.[9] It also successfully negotiated with the Halifax Board to lease the four classroom school building located on the ten acre site for $1.00 per year. (314 F. Supp. 70-71; A. 294).

When this case came on for hearing on the motion of the United States for a preliminary injunction on August of 1969, the Halifax Board was planning to assign its children by freedom of choice. The facts before the district court were that 350 of the 387 white children who lived in the county and who had attended Scotland Neck School in 1968-69 (A. 250) had paid a deposit on their tuition to return for the 1969-70 school year and that the five black schools in the area would be at least 97.8% black. There was, of course, no assurance that the handful of whites who had not transferred to Scotland Neck would not do so later (A. 522) or would show up at the black schools. The only differences between the school boards' proposals for the 1969-70 school year and the situation which had existed at the Scotland Neck School in 1968-69 were that about half of the white children would pay tuition and the black ratio would have increased from 19.8% to 25.9% (Maps and

[8] See note 7, *supra*.
[9] See note 2, *supra*.

Tables, Tables I and IV). The black schools would remain all-black or virtually all-black.

6. *Events Subsequent to the Preliminary Injunction*

On November 24, 1969, the district court directed the Halifax County Board of Education to submit a desegregation plan on December 15 (A. 924). On that date, the Board reluctantly submitted the State's Interim Plan, indicating that it knew of no better plan to disestablish the dual system. On May 19, 1970, Judge Larkins approved the Interim Plan and ordered that it be fully implemented by June 1, 1970.

Following the final judgment in this case enjoining Chapter 31, entered on May 26, 1970, the Halifax School Board filed a motion (A. 1089) requesting that it be permitted to implement the Interim Plan except in Scotland Neck where it proposed to assign all town students to the Scotland Neck School (See Map IV, Maps and Tables). Both the United States and the private plaintiffs objected. The Government correctly characterized the motion as an application for a stay pending appeal (A. 1092). The Board attached a Map (Exhibit A) to its motion which shows what District I would look like if both the Interim Plan and the Scotland Neck Unit were put into effect (Map IV, Maps and Tables). The Brawley zone would entirely encircle the Town of Scotland Neck—like a doughnut—instead of including the Town of Scotland Neck as would be accomplished by the Interim Plan. Scotland Neck School would continue to serve Scotland Neck children in grades 1 through 12. All high school students in District I outside of the town limits would be assigned to Brawley rather than to Scotland Neck as would happen under the Interim Plan. The Board indicated on the Map the number of children by race residing in each zone as follows:

Grades	School	White	Black	Pupils Total	Pupils % Black
		Scotland Neck Unit			
1–12	Scotland Neck	399	296	695	42.6
		Remainder of District I			
1–12	Brawley	83	805	888	90.7
1–8	Bakers	9	357	366	97.5
1–8	Thomas Shields	85	233	318	73.2
1–8	Dawson	60	388	448	86.6
1–8	Tillery Chapel	22	211	233	90.6

Presumably these would be the assignments if the Scotland Neck Unit were allowed to operate but were subject to the Court of Appeals' injunction against permitting transfers in or out.

ARGUMENT

The District Court Correctly Enjoined the Division of Halifax County's System into Two Separate Units Where the Changed Boundaries Would Impede Desegregation and Where Formerly Ignoring Such Boundaries Was Instrumental in Promoting Segregation.

Introduction and Summary of Argument

We submit in Part I, *infra*, that the decision of the district court is consistent with the basic principles enunciated in this Court's various school desegregation decisions following *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*), including the most recent decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and companion cases. We believe that the Court of Appeals departed from those principles in important respects. In particular, we urge that the district court was correct in evaluating Chapter 31 in relation to its effect on the various desegregation alternatives available in Halifax County. We think the Court of Appeals erred by adopting a rule that Chapter 31 should be sustained unless plaintiffs proved that its "primary purpose is to retain as much separation of the races as possible." The Fifth Circuit has applied a correct rule in deciding similar cases, namely, that districts engaged in the desegregation process may not make boundary changes which impede desegregation, particularly where such boundaries were ignored to facilitate a dual system. See, *e.g.*, *Lee* v. *Macon County Board of Education (Calhoun County School System and City of Oxford School System)*, 448 F.2d 746 (5th Cir. 1971); *Stout* v. *Jefferson County Board of Education*, 448 F.2d 403 (5th Cir. 1971).

In Part II, below, we focus on the facts of Halifax County and urge that the district court was correct in ruling that the proposed separation of Scotland Neck does impede desegregation, while the Court of Appeals erred by labeling the change "minimal" and "hardly substantial" in its impact on the desegregation process. We show that the dual system in Halifax County was long sustained and facilitated by ignoring boundaries of the kind now erected to maintain Scotland Neck School as a majority white school while nearby Brawley and four other black schools will be maintained as black institutions. The proposed separation of Scotland Neck is in conflict with the requirement that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation" (*Swann* v. *Board of Education*, 402 U.S. 1, 26 (1971); *Davis* v. *Board of* School Commissioners, 402 U.S. 33, 37 (1971)), and impedes the use of conventional desegregation techniques, *e.g.*, the "pairing" of nearby schools (*Swann, supra* at 27); see also *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971). While no particular degree or percentage of racial balancing is required by the Constitution, the shifting percentages caused by the separation of Scotland Neck would continue existing all-black schools and schools that are "substantially disproportionate in their racial composition" (*Swann, supra*, 402 U.S. 1, 26).

I.

The District Court Correctly Evaluated the Proposed Scotland Neck Secession in Terms of Its Effectiveness in Dismantling School Segregation in Eastern Halifax County.

The district court had the crucial responsibility to see to it that all vestiges of state imposed segregation in Halifax County be eliminated forthwith. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955); *Green* v. *County School Board of New Kent County*, 391 U.S. 403 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971). It is beyond question that a typical pattern of a racially segregated dual school system which had been erected pursuant to the Constitution and laws of the State of North Carolina, continued to exist in rural Halifax County almost undisturbed when this case came before the district court in August and December of 1969. See Part II, *infra*. In this case the district court thought that its duty "under this Court's mandate to eliminate racially separate public schools established and maintained by state action" (*Swann*, *supra*, 402 U.S. 1, 5), was to compare the proposed secession of Scotland Neck from Halifax County with other proposals in terms of their relative effectiveness in dismantling school segregation root and branch. *Green* v. *County School Board of New Kent County*, 391 U.S. 403 (1968). Applying this standard, the district judges found that the operation of the new school unit would impede rather than further de-

segregation. The court therefore enjoined its operation and ordered the Halifax County Board to implement the more effective plan which had been proposed by North Carolina's Department of Public Instruction.

We think that this approach was entirely consistent with this Court's school desegregation decisions. The novelty of a state law changing a district's boundaries in the face of desegregation does not avert *Brown's* basic thrust. *Brown II* envisioned that the equitable power of the district courts ought to be addressed to revision of "school districts" as well as individual schools and attendance areas. This was assumed by the Court in enumerating factors that might justify delay in immediate desegregation:

> To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, *revision of school districts* and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. (349 U.S. at 300-301; emphasis added.)

In declaring segregation unconstitutional, the Court made plain that "all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle" (*Brown II, supra,* 349 U.S. at 298). Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960).

The Court announced in *Green* and reaffirmed in *Swann* that a "school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness." 402 U.S. 1, at 25. *Green* said that school boards had "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimina-

tion would be eliminated root and branch." 391 U.S. at 437-438. *Swann* articulated further guidelines including, *inter alia,* the requirement that district judges and school authorities "make every effort to achieve the greatest possible degree of actual desegregation"; the articulation of "a presumption against schools that are substantially disproportionate in their racial composition" with the burden on school authorities to justify any one-race schools as not resulting from past discriminatory action; and the endorsement of the use of drastically altered attendance zones, and techniques of pairing and non-contiguous zoning to dismantle segregated systems. 402 U.S. at 26-28. See also *Davis* v. *School Commissioners of Mobile County;* 402 U.S. 33, 37 (1971). Moreover, the Court made it clear that assignment plans are "not acceptable simply because . . . [they appear] to be neutral" if they fail to counteract the continuing effects of past discrimination. 402 U.S. at 28.

Swann also reflected the Court's understanding of the manifold means by which school authorities control the racial composition of schools, noting the great influence exerted by decisions about school location and construction, and requiring that Court's look to the future to prevent such decisions from being used to perpetuate or reestablish dual systems. 402 U.S. at 20-21. Finally, *Swann* reemphasized the broad remedial discretion of the district judges where school authorities have defaulted in their constitutional obligation to provide a racially nondiscriminatory system of public schools. 402 U.S. at 15-18, 25, 28, 31.

As previously mentioned the district court concluded that Chapter 31 "was enacted with the effect of creating a refuge for white students of the Halifax County School system, and interferes with the desegregation of the Hali-

fax County School system, in accord with the plan adopted by said Board to be implemented on or before June 1, 1970." 314 F. Supp. at 78. This conclusion, buttressed by detailed fact-findings, supported the decision to enjoin Chapter 31 as an interference with the best available desegregation plan and is in accord with *Green* and *Swann*.

The Court of Appeals took a very different approach. It began by assuming that the withdrawal of a small area in the middle of the eastern portion of Halifax County at a time when the Halifax School Board was under an immediate duty to produce and implement an effective school desegregation plan was to be viewed as a normal creation of a political entity by the State of North Carolina:

> Appellees urge in their brief that conceptually the way to analyze this case is to "view the results of severance as if it were part of a desegregation plan for the original system." We do not agree. The severance was not part of a desegregation plan proposed by the school board but was instead an action by the Legislature redefining the boundaries of local governmental units. 442 F.2d at 382-83.[10]

Rejecting the standard of *Green* requiring the selection of the most effective plan, the Court of Appeals designed the "primary purpose" test to determine whether the new school unit would violate the Fourteenth Amendment.

> If the creation of a new school district is designed to further the aim of providing quality education and

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[10] The court went on to assume "For the sake of argument that appellees' method of analysis is correct" and concluded "that the severance of Scotland Neck students would withstand constitutional challenges." 442 F.2d at 583. In our next argument (II), we demonstrate why the district court was correct in its determination that the new unit would impermissibly impede desegregation in Halifax County.

> is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. The test is much easier to state than it is to apply.

Wright v. *Council of City of Emporia*, 442 F.2d 570, 572 (4th Cir. 1971).[11] In applying this test to Scotland Neck, the majority of the Court of Appeals concluded that "The purpose of Chapter 31 was not to invidiously discriminate against black students in Halifax County . . ." (442 F.2d at 582). We agree with the dissenting judges below that even if the primary purpose test were appropriate, the record here decisively reveals an overriding motive of segregation.[12] However, the analysis employed by the

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[11] The rule which applied to the three cases which were decided together (*Emporia*, *Scotland Neck* and *Turner* v. *Littleton-Lake Gaston School District*, 442 F.2d 584 (4th Cir. 1971), was most fully discussed in *Emporia*.

[12] Judge Sobeloff applied the majority's test (442 F.2d at 598-60) and came to the "conclusion that race was the dominant consideration and that the goal was to achieve a degree of racial apartheid more congenial to the white community." 442 F.2d at 600. Judge Winter also reviewed the facts, 442 F.2d at 591-92, and reached the same result. "On the facts I cannot find the citizens of Scotland Neck motivated by the benign purpose of providing additional funds for their schools; patently they seek to blunt the mandate of *Brown*." 442 F.2d at 592. We would only add a brief discussion of two matters to what Judges Sobeloff and Winter have said.

Judge Craven found for the majority that the unconstitutional transfer plan did not affect the constitutional validity of Chapter 31 (442 F.2d at n. 3, 581-82) even though a similar plan was relevant in determining the constitutional invalidity of the new district in *Littleton-Lake Gaston* (442 F.2d n. 2, 587) because the legislature did not know of the proposed transfer plan for Scotland Neck but did for Littleton-Lake Gaston. Judges Sobeloff and Winter convincingly found the transfer plan very relevant to the

Court of Appeals is considerably more pernicious in terms of the future course of school desegregation than in its application to a particular case.[13]

The "primary purpose" doctrine is a dangerous departure from the firmly established principles worked out by this Court and lower courts since *Brown* to ensure that all the interlacing laws, practices and customs which have sup-

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issue of purpose. 442 F.2d at 591-92; 442 F.2d 598-99. What is conclusive, however, is the district court's specific finding based on substantial evidence that Representative Gregory, who introduced and shepherded Chapter 31 through the State House, had full knowledge of the transfer plan. See p. 15, *supra*. Moreover, the law did not take effect until after a vote of the residents of Scotland Neck where the issue was supported by the same people who sought its passage in the legislature and who established the transfer plan immediately after its implementation. Finally, the transfer plan was readily foreseeable since it was permissible under state law. See note 5, *supra*.

Second, Judge Craven in finding the selection of the town boundaries to be a "natural geographic boundary" and seeing "no indication that the geographic boundaries were drawn to include white students and exclude black students . . ." 442 F.2d at 582, thought that this pointed towards a benign purpose. We dispute both assertions. We know of nothing "natural" about the political boundaries of a town. See pp. 39-40, *infra*. And we think that the selection of Scotland Neck, which is the only area of eastern Halifax County which has a majority white student population, raises an inference of racial motive. Map IV, Maps and Tables; see pp. 39-40, *infra*.

[13] Judge Sobeloff observed: "I find no precedent for this test and it is neither broad enough nor rigorous enough to fulfill the Constitution's mandate. Moreover, it cannot succeed in attaining even its intended reach, since resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all considerations of race muted beyond range of the court's ears." 442 F.2d at 594. The doctrine will trap federal courts "in a quagmire of litigation. The doctrine formulated by the court is ill-conceived and surely will impede and frustrate prospects for successful desegregation. Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white." 442 F.2d at 600. See also, Brief for Petitioners, *Wright* v. *Council of City of Emporia*, No. 70-188, pp. 37-46.

ported dual school systems are dismantled and abolished. It is fundamentally wrong, therefore, to say as the Court of Appeals has said, that an act of the legislature aimed at altering the structure of a single school system amidst a desegregation controversy is to be judged by its "primary purpose" and not by its effect on the desegregation in the locality. It was error to require that plaintiffs prove the "primary purpose" to segregate where they have shown that the effect of the law impedes desegregation.

It was recognized by this Court from the start that school segregation is the product of a whole battery of devices rooted in state action. A variety of schemes and arrangements have cropped up over the years which served to withhold the promise of *Brown*. The Court has rejected time and again claims that the action of one state official or agency or another has some kind of insulation from judicial scrutiny. This has been so because:

> In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."

Cooper v. *Aaron*, 358 U.S. 1, 17 (1958). See also, *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E.D. La. 1960), *aff'd sub nom. City of New Orleans* v. *Bush*, 366 U.S. 212 (1961); *Griffin* v. *School Board*, 377 U.S. 218 (1964); and see the authorities collected in Judge Sobeloff's dissent below, 442 F.2d at 593-594, nn. 1, 2, 3, 4 and 5. See also cases invalidating a host of private school tuition grant schemes *infra*, Part II, note 26.

The Court of Appeals acknowledged in the *Emporia* case that the device of carving up school districts into a number of separate units posed a "serious danger" of obstructing desegregation. *Wright* v. *Council of City of Emporia*, 442 F.2d 570, 572 (4th Cir. 1971). This danger has been clearly perceived and decisively dealt with by the lower federal courts. It is very significant that every such attempted secession which we have found reported in the lower federal courts—with the sole exception of the *Scotland Neck* and *Emporia* cases—has resulted in a decision disapproving such secessions as unconstitutional evasions of *Brown*. *Lee* v. *Macon County Board of Education (Calhoun County School System and City of Oxford School System)*, 448 F.2d 746 (5th Cir. 1971); *Stout* v. *Jefferson County Board of Education*, 448 F.2d 403 (5th Cir. 1972); *Burleson* v. *County Board of Election Commissioners of Jefferson County*, 308 F. Supp. 352 (E.D. Ark. 1970), *affirmed*, 432 F.2d 1356 (8th Cir. 1970); *Turner* v. *Warren County Board of Education*, 313 F. Supp. 380 (E.D. N.C. 1970), *affirmed sub nom. Turner* v. *Littleton-Lake Gaston School District*, 442 F.2d 584 (4th Cir. 1971); *Aytch* v. *Mitchell*, 320 F. Supp. 1372 (E.D. Ark. 1971); *cf. Jenkins* v. *Township of Morris School Dist.*, 58 N.J. 483, 279 A.2d 619 (1971). In each of these cases an attempted secession was struck down as an interference with desegregation.

Similarly, in a long series of cases where existing school districts have been established on a racially segregated basis, the courts have ordered desegregation plans which effectively merged racially separate districts. *Haney* v. *County Board of Education of Sevier County*, 410 F.2d 920 (8th Cir. 1969); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *affirmed*, 447 F.2d 441 (5th Cir. 1971); *Evans* v. *Buchanan*, 207 F. Supp. 820, 825 (D. Del. 1962); *Sloan* v. *Tenth School District of Wilson County, Tenn.*,

433 F.2d 587, 588 (6th Cir. 1970) (mentioning prior proceedings involving merger of three overlapping districts); *United States* v. *Bright Star School District #6,* unreported, W.D. Ark. No. T-69-C-24, April 15, 1970; *United States* v. *Crockett County Board of Education,* unreported, W.D. Tenn., C.A. No. 1663, May 15, 1967.

The two recent Fifth Circuit decisions in *Lee* and *Stout,* both decided since this Court's decisions in *Swann* and companion cases provide the approach which we believe should be used in deciding such controversies. The decision in *Stout, supra,* by a unanimous panel of Judges Thornberry, Clark and Ingraham, held that splinter school districts, albeit valid under state law, need not be recognized where they thwart implementation of a unitary school system. The court relied upon this Court's decision striking down the North Carolina Anti-Bussing statute, *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45 (1971), quoting the following language from that opinion by the Chief Justice:

> . . . [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

Stout v. *Jefferson County Board of Education,* 448 F.2d 403, 404 (5th Cir. 1971).

The opinion in *Lee, supra,* by Judge Wisdom (joined by Judge Simpson, as on this issue by Judge Coleman) held that in confronting the secession of the City of Oxford school system from the Calhoun County system the district court properly treated the two systems as one for the

purpose of developing a desegregation plan. Judge Wisdom wrote in *Lee*, 448 F.2d at 752:

> For purposes of relief, the district court treated the Calhoun County and Oxford City systems as one. We hold that the district court's approach was fully within its judicial discretion and was the proper way to handle the problem raised by Oxford's reinstitution of a separate city school system. The City's action removing its schools from the county system took place while the city schools, through the county board, were under court order to establish a unitary school system. The city cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district. If this were legally permissible, there could be incorporated towns for every white neighborhood in every city. [Citations omitted] . . . Even historically separate school districts, where shown to be created as a part of a statewide dual school system or to have cooperated together in the maintenance of such a system, have been treated as one for purposes of desegregation. [Citations omitted] . . .
>
> School district lines within a state are matters of political convenience. It is unnecessary to decide whether long-established and racially untainted boundaries may be disregarded in dismantling school segregation. *New* boundaries cannot be drawn where they would result in less desegregation when formerly the lack of a boundary was instrumental in promoting segregation. Cf. Henry v. Clarksdale Municipal Separate School District, 5 Cir. 1969, 409 F.2d 683, 688, n. 10.

We believe that Judge Wisdom's formulation provides a principle for decision consistent with the case law developed in this Court from *Brown* to *Swann* and capable of coping with a potentially widespread new pattern of evasion, the "incorporated town for every white neighborhood." The courts below in this case wrote without benefit of this Court's opinion in *Swann*, but nevertheless Judge Winter's dissent (joined by Judge Sobeloff) reached a formulation based on *Green* that is similarly satisfactory:

> Given the application of the *Green* rationale, the remaining task in each of these cases is to discern whether the proposed subdivision will have negative effects on the integration process in each area, and, if so, whether its advocates have borne the "heavy burden" of persuasion imposed by Green. (442 F.2d at 589).

Judge Sobeloff's dissenting opinion stated that the test for any such secession was whether it served a "compelling and overriding" state interest:

> If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated. This test is more easily applied, more fully implements the prohibition of the Fourteenth Amendment and has already gained firm root in the law. (442 F.2d at 595).

Of course Judges Sobeloff and Winter did not have the benefit of *Swann's* statement that in traditionally dual systems there is a "presumption against schools that are substantially disproportionate in their racial composition" (402 U.S. at 26), and the holding that all proposals contemplating disproportionate schools should be scrutinized

"to satisfy the court that their racial composition is not the result of present or past discriminatory action . . ." (402 U.S. at 26).

Whatever verbal formulation is used to state the test, we think the Fourth Circuit's emphasis on the requirement that plaintiffs show a legislative motivation to promote segregation is basically inconsistent with effective implementation of *Brown* in the face of determined tactics of resistance and evasion. The response by all of the other federal courts which have faced the secession tactic points the way to full realization of the right to a racially nondiscriminatory public education.

II.

The Separation of Scotland Neck From the Halifax County School System Impedes Desegregation of the Schools Involved.

An analysis of the facts in this case demonstrates the correctness of the district court's ruling that the proposed secession would impede desegregation and the error of the court of appeals in labeling the change "hardly substantial" and "minimal". The application of the legal principles discussed in part I can best be understood by considering the facts with respect to: (1) the pattern of operation under the dual system, (2) the interim desegregation plan proposed by the state survey committee, and (3) the pattern which would have developed with Scotland Neck as a separate system, either with or without the interdistrict transfers.

A. *Organization of the Dual System in Scotland Neck Area.*

The eastern part of Halifax County around the town of Scotland Neck had a classic dual segregated system.

Scotland Neck School served all-white children for miles around in grades 1-12.[14] Five Black schools served the same region in a separate system for blacks. Brawley School (1-12)—less than a mile from Scotland Neck—served the same region with a high school zone entirely overlapping Scotland Neck's and partially overlapping its elementary zone (A. 273-276; 149). The other four black schools (Bakers, Tillery Chapel, Dawson and Thomas Shields) overlapped the balance of Scotland Neck's elementary attendance area. The black majority had "neighborhood" elementary schools while the white minority was bused to a regional elementary school at Scotland Neck (A. 273-276).

Under the dual system the boundary of the town of Scotland Neck had no significance whatsoever in the assignment of pupils. White pupils in the county came to town to attend Scotland Neck (A. 250), and black pupils living in town went to Brawley which was located just outside the city limits on the town's eastern boundary (A. 273-276). In 1960 an addition to Scotland Neck School—the four-classroom junior high site—was built *outside the town limits* in the county. Scotland Neck School was expanded periodically[15] to its present capacity of 1,000 students in order to serve the white population of the eastern end of the county, a larger population than the 695 resident pupils of the town. Similarly the establishment of Brawley[16] as a separate school for blacks just a short distance away on the

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[14] The nearest white school was Enfield, about 16 miles from Scotland Neck.

[15] Scotland Neck was built in 1903, with classroom additions and improvements in 1923, 1939, 1949, 1954 and 1960. (A. 667-A. 668)

[16] Brawley was built in 1926 with classroom additions and improvements in 1937, 1942, 1951, 1955, 1960 and 1968. (A. 652-A. 653)

town boundary (A. 233) was premised on using it to serve all blacks in the region—both within and without the City limits.

Under the dual system the Halifax County Board had a variety of arrangements ignoring even the boundaries with neighboring school administrative units where convenient or necessary to serve the ends of segregation. For example, Indian students were sent to the Haliwa School in the next county, Warren County; many black students were sent to Chaloner School in the Roanoke Rapids City system; and white pupils were sent to Littleton School in Warren County (A. 221). Similar arrangements brought pupils from other districts into the Halifax system to attend segregated schools. The footnote below details this widespread pattern of ignoring and crossing over school unit boundaries to implement segregation.[17] When the arrangement sending black children to Chaloner School located in the Roanoke Rapids system was challenged by the Department of Health, Education, and Welfare, the Halifax Board leased Chaloner from Roanoke Rapids and continued the black children in

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[17] (A. 221); Answer to interrogatory 3(d) (A. 859-860):

Approximate Number of Students Who Reside Within the Unit but Who Attend School Outside of the Unit

Year	*No. of Pupils by Race*	*School Unit of Residence*	*School and School Unit Attended*
1964–65	220 (Indian)	Halifax County	Haliwa-Warren County
	160 (White)	Halifax County	Littleton-Warren County
	800 (Negro)	Halifax County	Chaloner-Roanoke Rapids City
1965–66	220 (Indian)	Halifax County	Haliwa-Warren County
	155 (White)	Halifax County	Littleton-Warren County
	790 (Negro)	Halifax County	Chaloner-Roanoke Rapids City
1966–67	215 (Indian)	Halifax County	Haliwa-Warren County
	155 (White)	Halifax County	Littleton-Warren County
1967–68	150 (Indian)	Halifax County	Haliwa-Warren County
	150 (White)	Halifax County	Littleton-Warren County
1968–69	140 (Indian)	Halifax County	Haliwa-Warren County
	150 (White)	Halifax County	Littleton-Warren County
1969–70	75 (White)	Halifax County	Littleton-Warren County

the same building which thus became a part of the Halifax system even though it was located within the City of Roanoke Rapids.[18] In sum, the Halifax Board, like many other dual school systems,[19] freely ignored not only the boundaries of the town of Scotland Neck—which were never considered

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Approximate Number of Students Who Reside Outside of the Halifax County School Administrative Unit and Attend School Within the Unit

Year	*No. of Pupils by Race*	*School Unit of Residence*	*School Attended*
1964–65	75 (white)	Roanoke Rapids City	Wm. R. Davie
	40 (Negro)	Martin County	Thomas Shields
	20 (Negro)	Martin County	Brawley
	10 (white)	Martin County	Hobgood
	4 (white)	Martin County	Scotland Neck
1965–66	75 (white)	Roanoke Rapids City	Wm. R. Davie
	30 (Negro)	Martin County	Thomas Shields
	10 (Negro)	Martin County	Brawley
	5 (white)	Martin County	Scotland Neck
1966–67	75 (white)	Roanoke Rapids City	Wm. R. Davie
	10 (Negro)	Martin County	Thomas Shields
	5 (Negro)	Martin County	Brawley
	7 (white)	Martin County	Scotland Neck
1967–68	75 (white)	Roanoke Rapids City	Wm. R. Davie
	10 (Negro)	Martin County	Thomas Shields
	5 (Negro)	Martin County	Brawley
	7 (white)	Martin County	Scotland Neck
1968–69	75 (white)	Roanoke Rapids City	Wm. R. Davie
	10 (Negro)	Martin County	Thomas Shields
	5 (Negro)	Martin County	Brawley
1969–70	75 (white)	Roanoke Rapids City	Wm. R. Davie

[18] A. 821 and A. 860-861; Answers to Interrogatories 2 and 3(d).

[19] The following are some of the reported cases involving sending black pupils to adjacent county school systems in order to promote racial segregation; *Griffin* v. *Board of Education of Yancey County*, 186 F. Supp. 511 (W.D.N.C. 1960); *School Board of Warren County, Va.* v. *Kilby*, 259 F.2d 497 (4th Cir. 1958); *Goins* v. *County School Board of Grayson County, Va.*, 186 F. Supp. 753 (W.D. Va. 1960), *stay denied*, 282 F.2d 343 (4th Cir. 1960); *Corbin* v. *County School Board of Pulaski County, Va.*, 177 F.2d 924 (4th Cir. 1949); *Crisp* v. *County School Board of Pulaski County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 721; *Buckner* v. *County School Board of Greene County*, 332 F.2d 452 (4th Cir. 1964); *Walker* v. *County School Board of Floyd County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 714. *Cf. Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938).

relevant to school assignments—but also the boundaries of its own school district in order to promote and facilitate the dual system.

The adoption of a freedom of choice plan had a negligible impact on the dual pattern developed under state law. Judge Larkins found:

> "The county maintained the freedom-of-choice assignment plan for the next three years during which a few black students attended formerly all-white schools and no white students attended formerly all-black schools. For example, during the 1967-68 school year, all of the white students and 97% of the black students attended schools previously maintained for their own races. In that year, 10 of the 450 teachers in 18 schools were assigned across racial lines. About 35 black students attended the Scotland Neck schools during the 1967-68 school year." (314 F. Supp. at 67.)

In the eastern area of the county five schools remained all black under the free choice plan.[20] The result of "Freedom of Choice" at Scotland Neck and Brawley, both serving grades 1-12, less than a mile apart, directly parallels the situation of the Field and Gould Schools in *Raney* v. *Board of Education,* 391 U.S. 443, 445 (1968). See also the New Kent and Watkins schools in *Green, supra,* 391 U.S. at 441-442 (1968).

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[20] The intermediate desegregation arrangement negotiated by the Department of Justice for 1969-70 eliminated the dual pattern for a few classes of black 7th and 8th graders who were transferred en masse to white schools.

B. *The Interim Plan.*

The interim plan developed by the state survey committee approached the problem of establishing a unitary system by using the simplest of techniques, ordinary geographic zoning, to eliminate the dual pattern. Scotland Neck and Brawley would continue to serve the entire eastern region, but Scotland Neck was made the high school (10-12) and Brawley would serve grades 8-9.[21] Elementary children in the immediate environs of both schools would go to Brawley, with the Scotland Neck Junior High site used for certain elementary grades. The other four elementary schools in the district were also given geographic zones. Some measure of integration would be achieved at each school by this simple zoning technique (Table II, Maps and Tables). The white minority in the District I area (21%) would be somewhat concentrated in Scotland Neck (33.6% white) and Brawley (30.8% white) reflecting the population distribution at the elementary level. But at least Brawley would be desegregated for the first time and all pupils in grades 8-12 (or 9-12) would attend schools which reflected the racial composition of the eastern region of the county. The other four black elementary schools would also be desegregated for the first time with white populations reflecting those areas and ranging from 1.5% to 16.6%. (See Table II, Maps and Tables.) In sum, the state survey committee recommended an interim plan based on conventional geographic attendance zones by which there would be essentially as much school desegregation as there was residential integration in the area.

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[21] The interim plan proposed that the elementary schools serve grades 1-7 (A. 606). For some reason the December, 1968 projections by the Halifax Board show grades 1-8 at these schools (A. 681-682), and this is the grade structure actually put into effect, e.g., 1-8 at elementary schools, grade 9 at Brawley, and grades 10-12 at Scotland Neck.

The Halifax County School Board refused to accept this interim desegregation plan. Instead, the County Board offered more freedom of choice, while the white citizens of Scotland Neck and local white political leaders pushed through arrangements for the separate system in Scotland Neck over the opposition of the black community.

C. *The Assignment Pattern If Scotland Neck Secedes; the Doughnut-Shaped Zone for Brawley.*

The sudden designation of the town limits of Scotland Neck as the attendance boundary for Scotland Neck School, as we have noted, broke all precedent insofar as pupil assignments in the county were concerned.[22] The town boundary is in no sense a "natural boundary" although the opinion below inexplicably uses that phrase. The boundary is precisely a political and not a natural or geographic line following notable features of terrain or the like.[23] Maps show that the town line (developed by various annexations) follows a meandering cause with more than twenty sides not far different in character from the "uncouth twenty-eight-sided figure" involved in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 340 (1960). The Scotland Neck town limits are not drawn so as to exclude all blacks since the town has about 42.6% black pupils, but the limits do *include* so large a proportion of the whites in the area that the town is substantially "whiter" in population than the surrounding township. (See the attendance projections for Brawley and Scotland Neck; Map IV, Table III, Maps

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[22] By creating the state's smallest district, and the first new district since 1953, Chapter 31 also broke precedent and reversed the trend of consolidating small districts. See note 7, *supra*.

[23] In *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33, 36, 38 (1971), the Court ordered consideration of assignments across a major man-made barrier, a highway dividing the east and west parts of the district.

and Tables.) We note that a separate school system for Scotland Neck *plus four surrounding townships* which was proposed and defeated in 1965 (during the freedom of choice era) would not have had a white majority.[24]

The secession of Scotland Neck school effectively imposes on the county a peculiar zone for Brawley which must then serve elementary pupils on all sides of the town. The peculiar looking doughnut shaped zone for Brawley—with the town as the "hole"—which is created by carving the town out of the county system is the most flagrant kind of gerrymander. Yet, the Halifax County Board has no practical choice but to use some variation of this "doughnut" to serve as an elementary zone for those pupils living around the immediate environs of the town if the secession is permitted to proceed. (See Map IV, Maps and Tables.)

The new town school unit impedes desegregation and has "negative effects," to borrow Judge Winter's phrase, in a number of different ways. The effects are negative if the facts are analyzed either in terms of the impact on the remaining county school system as a whole, or the impact on Brawley and the other four black schools in the eastern end of the county.

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[24] U.S. Bureau of the Census, U.S. Census of Population: 1970 General Population Characteristics, North Carolina, pp. 35-116:

	Total	*White*	*Negro*	*Other*
Conoconnara Twp.	1,006	186	820	–
Palmyra Twp.	1,546	631	914	1
Roseneath Twp.	1,104	338	766	–
Scotland Neck Twp.	5,013	2,208	2,804	1
	8,669	3,363	5,304	2

(The Scotland Neck Township total included 2,869 persons in Scotland Neck Town.)

The lower courts focused discussion on the effect of the secession on the racial percentages in the entire county system. Judge Sobeloff described it this way:

> "The challenged legislation carves an enclave, 57% white and 43% black, from a previously 22% white and 77% black school system. No compelling or overriding state interest justifies the new district, and its formation has a racially discriminatory effect by allowing the white residents of Scotland Neck to shift their children from a school district where they are part of a 22% minority to one where they constitute a 57% majority" (442 F.2d at 597: footnote omitted).

Considering the same facts Judge Winter said: "The difference between the percentage of white students within the existing system and the newly-created one for Scotland Neck is thus 35%. A more flagrant example of the creation of a white haven, would be difficult to imagine" (442 F.2d at 591). By contrast, the opinion of the majority below, characterized the white majority in the town schools as "not large" and focused on the fact that removing the Scotland Neck pupils from the county changed the black percentage in the county "only 3 percent" from 77% to 80%. We think that the conclusion by the trial court and by the dissenting appeals judges that these statistics show a substantial impediment to desegregation is far more persuasive than the opposing view adopted below. The Court of Appeals majority did not have the benefit of this Court's decision in *Swann* when it wrote its decision. The court below reasoned that where the creation of new units "is designed to further the aim of providing quality education and is attended secondarily by a *modification of the racial balance, short of resegregation,* the federal courts should not interfere". *Wright* v. *Council of City of*

Emporia, 442 F.2d 570, 572 (4th Cir. 1971) (emphasis added). We think this notion that only effective "resegregation" is to be condemned completely misses the mark under *Swann*. *Swann* requires "the greatest possible degree of actual desegregation," and a presumption against one-race schools and other schools "substantially disproportionate in their racial composition." 402 U.S. at 26. *Swann* gives the district courts discretion to prevent construction and site selection decisions that will even tend to interfere with the elimination of, or threaten to reestablish, segregation. 402 U.S. at 20-21. The district courts need not withhold action against such a threat until resegregation is an accomplished fact. The Court of Appeals has approved the creation of a system in Scotland Neck which is substantially disproportionate from the surrounding county. Indeed, as we discuss further below, it is also substantially disproportionate with the immediate environs of Scotland Neck and the east end of the county.

The Court of Appeals also suggested that the secession was justified by the fact that the one school within the town would be "integrated" in accord with the town's population. 442 F.2d at 582. In dealing with the neighborhood school concept *Swann* makes it clear that some "racially neutral" assignment plans may be inadequate to "counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation," *Swann*, 402 U.S. at 28. As Judge Wisdom wrote in a famous voting discrimination case, "The promise of evenhanded justice in the future does not bind our hands in undoing past injustices" *United States* v. *Louisiana*, 225 F.Supp. 353, 396 (E.D. La. 1963), affirmed 380 U.S. 145 (1965).

D. *The Effect of Secession on Brawley and District I.*

We believe that a better understanding of what is accomplished by the secession of Scotland Neck is achieved by focusing on Scotland Neck and Brawley schools and on the other four black schools which make up District I in the east end of Halifax County. It is in this area that Chapter 31 had its major impact. The more distant areas of Halifax County are obviously not nearly so much affected as the area near Scotland Neck. The following chart shows the impact of Chapter 31 on the two schools most directly involved:

	Scotland Neck School				*Brawley School*			
	White	*% White*	*Black*	*% Black*	*White*	*% White*	*Black*	*% Black*
1968-69 (after transfer of grades 7 and 8 from Brawley to Scotland Neck)	786	80.3%	193	19.7%	0	0	1,106	100.0%
1969-70 (Proposed)								
a) Plan prepared by State Staff	325	33.7%	640	66.3%	330	30.8%	740	69.2%
b) If Chapter 31 were implemented	399	57.4%	296	42.6%	83	9.3%	805	90.7%

As Judge Winter noted, "local legislation is enacted as a result of local desire and pressure" (442 F.2d at 589). The local initiative in this case came from whites in Scotland Neck, in an attempt to keep their white school as white as possible. Under freedom of choice, only a handful of the students in their school were black. When the Justice Department insisted upon some desegregation progress for the 1968-69 school year, the County School Board moved the 7th and 8th grades from Brawley to Scotland Neck, raising the black enrollment to 19.7%. The complete de-

segregation plan drawn by state educational officials and accepted by the Justice Department would have increased the black population at Scotland Neck to 66.3%. It would also have assigned whites to Brawley for the first time, reducing the black enrollment to 69.2%.

With the creation of a new district, the Scotland Neck School would remain majority white. Instead of a 66% *black* majority under the state plan, it would have a 57% *white* majority and the number of white students assigned to Brawley would be reduced from 330 to 83.

These population shifts are substantial by any test: (1) the secession reduces Scotland Neck's black population by 24 percentage points and increases the white population a like amount (from 33.7% W-69.2% B to 57.4% W-42.6% B); (2) the secession reduces Brawley's white population by 21.5 percentage points and increases the black population a like amount (from 30.8% W-69.2% B to 9.3% W-90.7% B). These changes would make both Brawley and Scotland Neck substantially racially disproportionate, *Swann, supra,* 402 U.S. at 26. The pupil population in District I—the entire eastern region has ranged from 76%-79% black in recent years (see Table III, Maps and Tables). The combined populations of the Scotland Neck Unit (the town) and the Brawley zone surrounding it are about 69.5% black (Table III). Obviously creating a 90.7% black Brawley perpetuates its racial identification and it is entirely unjustifiable to reject the state interim plan which would make Brawley 69.2% black, an enrollment much more nearly conforming to the demography of the area.

A similar plain pattern emerges when figures for District I as a whole are analyzed (see Tables III and IV, Maps and Tables):

(June 1970)	*% White*	*% Black*
(1) Interim Plan:		
District I	22.3%	77.6%
(2) If Chapter 31 implemented:		
(a) Scotland Neck School	57.4%	42.6%
(b) Rest of District I	14.6%	85.4%

The very considerable racial concentrations and racial disproportions which would be created by the implementation of Chapter 31 are plainly inconsistent with the goal of achieving "the greatest possible degree of actual desegregation" and of eliminating schools identified as one-race schools. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971).

This Court made it plain in *Swann* that the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole" (402 U.S. at 24). We make no contrary argument, nor do we argue that there must be any particular degree of racial balance at the schools involved. But *Swann* also held that in dual systems "the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition" (402 U.S. at 26). It was further stated that this presumption could only be met by a showing that continuing disproportionate schools were "not the result of present or past discriminatory action" by school

boards. 402 U.S. at 26.[25] Applying this test to Scotland Neck and Brawley presents little difficulty since their continued character as schools for whites and blacks, respectively would obviously reflect the historic dual pattern in the community. It might be noted that Judge Craven, writing for the majority below, held that the inability of Scotland Neck citizens to spend more money on education without secession justified the racial disproportion created by the separation. 442 F.2d at 583. Judge Winter, in dissent, retorted that "a community should not be permitted to buy its way out of *Brown*." 442 F.2d at 592. *Swann* made it clear that Judge Winter was correct, and that the burden to justify a continued one-race or seriously disproportionate school cannot be satisfied by such a showing where the original segregation in the institutions so plainly results from discrimination. The secession plan to

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[25] The full paragraph from which these quotations are drawn reads as follows (402 U.S. at 26):

> In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

keep Brawley virtually all-black and Scotland Neck a school with a disproportionate and unusual concentration of whites is plainly unjustifiable under the standards of *Swann*.

E. *The Interdistrict Transfer Plans.*

Immediately after enactment of Chapter 31 a number of events occurred which had important impact on desegregation. The Scotland Neck junior high school site, located outside the town limits, would have been unavailable to the new town school system because of its location. This difficulty was solved by the new town system leasing the school from the Halifax County system for one dollar a year, and extending the district to cover 10 more acres. A. 476-477. The need for this four classroom building was related to the anticipated transfer of county residents to the town schools, an eventuality planned from the outset of the planning for the new district. The town had but 695 resident pupils and could accommodate about 1,000 students. 314 F.Supp. at 71; A. 294. The Scotland Neck School Board promptly offered to admit any county resident pupil who paid a tuition charge (with a special discount rate for families with more than one child). As expected, almost all white pupils who lived in the county but previously attended Scotland Neck promptly paid deposits to continue their attendance at Scotland Neck. By the time of the preliminary injunction hearing in August 1969—with the opening of school imminent—350 white and 10 black county resident pupils had made tuition deposits for Scotland Neck School. 314 F.Supp. at 71. Furthermore, the Scotland Neck and Halifax County School Boards agreed that for two years black pupils living within the town of Scotland Neck could, if they desired, continue to go to Brawley High School tuition free. 314 F.Supp. at 71.

Thus blacks who chose continued segregation could have it free of charge. Blacks who wanted to transfer into the town to go to an integrated school would have to pay tuition. The district judge found that "in view of the economics of the situation . . . [there was] an inability of blacks to afford the transfer fees . . ." (314 F. Supp. at 78).

The preliminary injunction against the new unit aborted the transfer scheme. Thereafter, the board filed a pleading stating that it intended to allow only transfers which conformed to the law and court orders, but rather than abandoning the idea of transfers the board sought in the Fourth Circuit to have it approved (442 F.2d at 592). The Fourth Circuit analyzed the plan in these terms:

> The net result of these transfers would have been to have 74 percent white students and 26 percent black students in the Scotland Neck system. We conclude that these transfers would have tended toward establishment of a resegregated system and that the transfer plan violates the equal protection clause of the Fourteenth Amendment. See Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968). (442 F.2d 583-584; footnote omitted.)

The local effect on Brawley School and District I is even more drastic and reveals the almost complete success of the transfer plan in keeping the five black schools all black. *The transfer plan would have left the five remaining schools in District I 97.8% Black.* (Table IV, Maps and Tables.) Thus is the full dimension of the evasive scheme unveiled.

The district judge treated Chapter 31 and the transfer plan together as a package when he granted the preliminary injunction. This was necessary to deal with the realities of the situation. Months later, when writing a final

opinion, the district court still found that the secession created a "refuge for white students" and "interferes with the desegregation of Halifax County School System" even without the effect of the transfers. 314 F. Supp. 78.

F. *Other Effects of the Secession of Scotland Neck.*

Beyond the racial ratios and percentages involved, Chapter 31 had other negative effects. Of course the essence of its operation is to prevent the use of the pairing technique as a means of desegregating Brawley and Scotland Neck. These two schools three-fourths of a mile and a 5 minute bus ride apart (A. 276), serving the same grades, were naturally slated for some sort of pairing or consolidation in the event of desegregation. Chapter 31 interjects a new boundary line to prevent the use of the pairing or consolidation technique (A. 431). As such it impedes a necessary and conventional desegregation technique. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 27 (1971). In this respect, Chapter 31 operates similar to the way the North Carolina Anti-Bussing statute impeded the use of transportation and other necessary desegregation techniques and is unconstitutional on this ground. *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45-46 (1971); *cf. Lee* v. *Nyquist,* 318 F. Supp. 710 (W.D. N.Y. 1970), *affirmed per curiam,* 402 U.S. 935 (1971).

The secession not only prevents the desegregation of the traditional all-black school at Brawley, it also keeps a white majority at Scotland Neck. The district judge found that white proponents of Chapter 31 viewed it as an alternative to establishing private schools in the face of desegregation with a black majority in each school reflecting the population patterns. 314 F. Supp. at 73; A. 431. The relevant precedents made it plain to the white people of Scotland Neck that all-white private schools could receive no public

support or tuition grants.[26] Since a private school would lose public funding, a separate city unit with a more "acceptable" racial pattern was viewed as preferable by the proponents of Chapter 31. The new unit would not be all white and could thus get public tax funds. It would have a white majority because the chosen boundary embraced a white majority. Scotland Neck would become a quasi-private school for the tuition paying white residents of the County who transferred there. They would have the benefit of public funding for the school rather than attending a purely private school. Their attendance together with the financial inability of many county Negroes to pay the tuition insured the maintenance of a white majority school. Under this scheme the Scotland Neck School would be "white" enough in population to be acceptable to the whites and would have just enough blacks to enable it to achieve public financial support. It was a sophisticated evasion of the duty to desegregated public schools.

With sensitive perception, Judge Winter's dissenting opinion refers to the psychological effects on the black students of the white abandonment of the Halifax County

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[26] *Hawkins* v. *North Carolina State Board of Education*, 11 Race Rel. L. Rep. 745 (W.D. N.C., C.A. No. 2067, March 31, 1966) (three-judge court); *Griffin* v. *County School Board*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961); *aff'd*, 368 U.S. 515; *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (E.D. La. 1968), *affirmed per curiam*, 393 U.S. 16 (1968); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 475 (M.D. Ala. 1967), *affirmed per curiam, sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Griffin* v. *State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969); *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C. 1968), *affirmed*, 393 U.S. 222 (1968); *Coffey* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969); *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss. 1970), *affirmed*, 440 F.2d 1236 (5th Cir. 1971).

system. 442 F.2d at 591; also see at 590. The approval of Chapter 31 by the court below is premised in part on the idea that the purpose of curbing or diminishing white flight from a unitary school system "is entirely consistent with and may help implement the *Brown* principle." (442 F.2d at 581) Rather than being laudable the plan is fundamentally racist in its assumptions and underlying theory. Judge Sobeloff answers this theme in *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County, S. C.*, 429 F.2d 830, 826 (4th Cir. 1970). *Brown*, he points out, was not premised on any notion that "white children are a precious resource which should be fairly apportioned," or that "black children will be improved by association with their betters" (*ibid.*). "But school segregation is forbidden simply because its perpetuation is a living insult to the black children and immeasurably taints the education they receive. This is the precise lesson of *Brown*" (*ibid.*, Sobeloff, J.). So, too, the new secessionist Scotland Neck school administrative unit would be a living insult to the black pupils of Halifax County.

Finally, the district court judgment might well be affirmed as within its power to prevent school policies from influencing residential patterns in a segregationist fashion so as to lock in school segregation in the future. It is entirely obvious that creation of the new Scotland Neck unit would encourage whites, particularly those living near the boundary, to move into the town. *Swann* says that school policies "may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races." 402 U.S. at 21. District courts have the remedial responsibility "to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system".

(*ibid.*). The judgment of the district court requiring a desegregation plan which ignored the Scotland Neck town boundary—as it has always been ignored in the past—is well within the discretionary authority of the district court to prevent such threatened perpetuation or re-establishment of separation.

The broad discretion of the district court in formulating a remedy for the dual system includes the power to use a variety of remedial techniques, even techniques which "may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some." (*Swann*, 402 U.S. at 28.) "No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits" (*ibid.*). We suggest that the technique of assigning pupils across district lines of administrative units established by state law—a technique long, successfully and recently used as an instrumentality of segregation—may be used as a technique of desegregation. This is particularly true in a case such as Halifax County where interdistrict transfers are a part of the tradition of the system. We think the technique may be appropriate in other instances as well, but we do not ask that the Court prejudge the question of interdistrict remedial transfers across long established or racially untainted boundaries. Cases involving such issues are being litigated in the lower courts and this case does not have the kind of record upon which to adequately judge such metropolitan integration disputes. It is enough to decide the present case to conclude as Judge Wisdom did. *Lee* v. *Macon County Board of Education*, 448 F.2d 746, 752 (5th Cir. 1971): "*New* boundaries cannot be drawn where they would result in less desegregation when formerly the lack of a boundary was instrumental in promoting segregation."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the judgment of the United States District Court for the Eastern District of North Carolina should be reinstated.

Respectfully submitted,

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Appendix to petitioners' brief
NOT PRINTED.